

Internal Revenue Service

memorandum

CC:TL-N-508-89

Br4:RJFitzpatrick

date: DEC 28 1988 1989

to: District Counsel, San Francisco W:SF
Attn: L. Murphy

from: Assistant Chief Counsel (Tax Litigation) CC:TL

subject: [REDACTED] v. Commissioner, T.C. Docket No. [REDACTED]

This responds to your request regarding the litigating posture your office should adopt in this attorney's fees controversy in light of certain facts and materials available to the Collection Division at the administrative stages of the proceeding. We appreciate the extent to which your incoming request discusses the facts and law of the case at length and points out its strengths and weaknesses. It is apparent that your trial attorney has devoted a great deal of time to the case and has an excellent grasp of the matter.

Since the petition in this case was filed prior to the effective date of the 1986 amendment of I.R.C. § 7430, we agree that the law prior to such changes should be applied. As noted in your request, the courts are divided on the issue of whether the position of the United States is to be based solely on the government's position during litigation or whether such position includes an examination of the administrative action taken by the Commissioner. We concur with your view that the Tax Court will be constrained to follow the Ninth Circuit's view that consideration should be given to the administrative action taken by the Commissioner. [REDACTED]

[REDACTED]; Silwa v. Commissioner, 837 F.2d 602 (9th Cir. 1988). We must therefore pay special attention to the issuance of collection notices and continuation of collection activity after the petition was filed in developing the litigating posture for this case.

We will not repeat the comprehensive recitation of the facts as set out in your request but the following is clear. During [REDACTED], petitioner was married and filed a joint return with her husband for that year. In [REDACTED] of [REDACTED] petitioner was divorced. For the years [REDACTED], [REDACTED], and [REDACTED] petitioner filed individual income tax returns designating her filing status as "single" and with a new address. On [REDACTED] a joint statutory notice was sent certified mail and returned

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undeliverable. Petitioner was not aware of the existence of such deficiency against her until receipt of the [REDACTED] final notice which demanded payment of the taxes. It was not until [REDACTED] that counsel for petitioner even alluded to the possibility that the notice may be invalid. Petitioner's counsel never offered any independent corroboration to the Collection Division regarding the invalidity of the notice. Prior to the filing of the petition in this case, it does not appear that the Revenue Officer knew or had reason to know that the notice was invalid. However, the Revenue Officer knew of the filing of the petition in this case on [REDACTED].

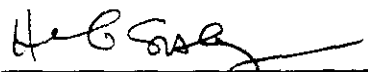
Despite an Assistant District Counsel's telephone call to the Revenue Officer's supervisor on September 16, 1985 to suspend collection, it is apparent from our review of the Investigation History report that the collection activities continued until October 31, 1985 when District Counsel advised by memorandum that all collection action with regard to petitioner should be suspended pending the Tax Court's consideration of the controversy. Although it is our opinion that District Counsel handled this case as expeditiously as possible, this failure to suspend collection activities would be difficult to justify to the Tax Court. Once the petition was filed in this case, respondent proceeded in a timely fashion and gathered sufficient information to concede this case. Petitioner appears to assert that respondent was unreasonable in refusing to concede the case until petitioner's claims had been substantiated. As you correctly point out in your request, the fact that respondent required some corroboration of the various factual statements made by counsel for petitioner is eminently reasonable. Accordingly, we agree with your conclusion that District Counsel itself acted reasonably in this case.

This leads us to the principal concern in this case; the Service's subsequent (post-petition) collection activity. The Tax Court's determination as to whether the Service acted reasonably in this case, utilizing the criteria stated for remand, would likely involve a review of the Collection Division's basis for its actions. But cf., Wickert v. Commissioner, 842 F.2d 1005 (8th Cir. 1988) (Eighth Circuit utilized the in-court litigating position and did not examine whether the continued collection efforts were unreasonable). Whether or not the Service acted unreasonably in pursuing collection of the assessment after the filing of a petition in this case, albeit an untimely petition, must be the focus of the inquiry. Specifically, we believe that the Tax Court will inquire into the extent the facts available left the impression that continuing with collection activities instead of suspension was unreasonable. See, Don Casey Co. v. Commissioner, 87 T.C. 847, 862 (1987).

Upon review of the Investigation History report, the telephone conversations appear reflect a lack of appreciation for the Service's responsibility to send the notice to the taxpayer's last known address. The reader is left with the impression that the Collection Division was not concerned with whether or not the petitioner received a proper notice. Although it may be argued that the Collection Division acted reasonably in reliance on the presumption of regularity and validity of the notice of deficiency in pursuing collection, we share your concern that litigation hazards exist. The sole issue raised in the petition was whether the notice was sent to petitioner's last known address. Until the Service ascertains whether the notice was sent to the taxpayer's last known address, it is difficult to justify the Service's failure to suspend collection activities pending such an inquiry. Although we acknowledge that the Collection Division did not proceed with enforced collection in this case, the state of affairs is such that settlement is in the Service's best interest, subject to substantiation and reasonableness, despite the apparently innocuous manner in which the Collection Division pursued the matter. See, Mearkle v. Commissioner, 90 T.C. 1256 (1988) (discussion of reasonableness of attorney's fees).

We agree with your conclusion that District Counsel's defense against petitioner's demand for attorney's fees for the [REDACTED] suit was reasonable. District Counsel's position was based upon a reliance on the then existing case law and in fact the Tax Court denied the petitioner's motion for fees following Fuller v. Commissioner, T.C. Memo. 1986-33. See also, Sanders v. Commissioner, 813 F.2d 859 (7th Cir. 1987); Latch v. United States, 842 F.2d 1031 (9th Cir. 1988). Your proposed litigation posture with respect to this point is correct and your reference to Powell v. Commissioner, 91 T.C. No. 43 (September 26, 1988) is also a proper interpretation of how this case should proceed in the defense of this aspect of petitioner's request for attorney's fees. The analysis of the "reasonableness" of the government's appellate court proceeding should be viewed separately from the Tax Court proceeding. In any event, we do not believe the petitioner has any basis to justify attorney's fees at the appellate level. All in all, settlement is the preferred course of action in our view, consistent with the foregoing discussion.

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